Supreme Court, U. S.
FILED
JAN 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC.
and STATE INSURANCE FUND,

Petitioners,

—against—

RALPH CAPUTO and Director, Office of Workers' Compensation Programs, United States Department of Labor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

PETER M. PRYOR
199 Church Street
New York, N.Y. 10007

WILLIAM M. KIMBALL
1 Battery Park Plaza
New York, N.Y. 10004

Counsel for Petitioners

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775
38

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Statute Involved 2

Question Presented 3

Statement 3

Summary of Argument 6

Argument

I Caputo's compensable status should be determined solely by the work he was doing while injured. 7

II Caputo's status is not compensable because he was not unloading a ship. 11

III Caputo was not "engaged in maritime employment" because the freight he was truck-loading was not in maritime commerce. 16

Conclusion 22

Appendix

Sections 2(3), 2(4), and 3(a) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 1426, as amended in 1972, 86 Stat. 1251, 33 U.S.C. 902(3), 902(4), 903(3)(a). i

PAGE

Portion of the Senate and House Reports, S.Rep. No. 92-1125, 92d Cong., 2d Sess., pp. 12-13; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., pp. 10-11, 1972 U.S. Code Cong. and Adm. News, vol. 3, pp. 4707-4708, entitled "Extension of Coverage to Shoreside Areas". ii

CITATIONS

Cases:

American President Lines, Ltd. v. Federal Maritime Board, 317 F.2d 887 (D.C. Cir. 1962) 19-21

Calcot, Ltd. v. Isbrandtsen Co., 318 F.2d 669 (1 Cir. 1963) 19

California v. United States, 46 F. Supp. 474 (N.D. Cal. 1942), aff'd 320 U.S. 577 (1944), reh. den. 321 U.S. 802 (1944) 18

Industrial Comm. v. Nordenholt Co., 259 U.S. 263 (1922) 16

International Terminal Operating Co., Inc. v. Blundo, (U.S. 76-454) 2, 6

I.T.O. Corp. of Baltimore v. Ben. Rev. Bd., 529 F.2d 1080 (4 Cir. 1975), reh. in banc 542 F.2d 903 (1976), cert. pend. sub nom. Adkins v. I.T.O. Corp. of Baltimore, (U.S. 76-730) 5, 13-15, 16

Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5 Cir. 1976), cert. pend. sub nom. P.C. Pfeiffer Co., Inc. v. Ford, (U.S. 76-641) 9, 15

PAGE

Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2 Cir. 1971) 19

Levinson v. Spector Motor Co., 330 U.S. 649 (1947) 15

Long Island R. Co. v. Lowe, 145 F.2d 516 (2 Cir. 1944) 10

Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969) 14

Parker v. Motor Boat Sales, 314 U.S. 244 (1941) 10

Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334 (1953) 9

Port Royal Marine Corporation v. United States, 378 F. Supp. 345 (S.D. Ga. 1974), aff'd 420 U.S. 901 (1975) 13

Richardson v. Goddard, 64 U.S. (23 How.) 28 (1859)..18, 19

Sea-Land Serv. v. Director [etc.], 540 F.2d 629 (3 Cir. 1976) 8, 16-17

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 15, 21

Stockman v. John T. Clark & Son of Boston, 539 F.2d 264 (1 Cir. 1976), cert. pend. sub nom. John T. Clark & Son of Boston, Inc. v. Stockman, (U.S. 76-571) 8, 10

The Eddy, 72 U.S. (5 Wall.) 481 (1866) 18, 19

United Pilots Ass'n v. Halecki, 358 U.S. 613 (1959) 15

Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), reh. den. 404 U.S. 1064 (1972) 16

Vicziano v. Industrial Export Lines, 1974 A.M.C. 1196 (S.D.N.Y. 1974) 16

Weyerhaeuser Company v. Gilmore, 528 F.2d 957 (9 Cir. 1975), cert. den. sub nom. Gilmore v. Weyerhaeuser Co., —— U.S. —— (U.S. 75-1620, 10/4/76) 9, 14, 16

PAGE

Administrative Agency Decisions:

Adkins v. I.T.O. Corporation of Baltimore, 1 BRBS 199 (1974), 1974 A.M.C. 2427, rev'd sub nom. I.T.O. Corp. of Baltimore v. Ben. Rev. Bd., 529 F.2d 1080 (4 Cir. 1975), reh. in banc 542 F.2d 903, cert. pend. sub nom. Adkins v. I.T.O. Corp. of Baltimore, (U.S. 76-730) 5

Avvento v. Hellenic Lines, 1 BRBS 174 (1974), 1975 A.M.C. 153 5

Free Time and Demurrage Charges at New York, 3 U.S.M.C. 89 (1948) 18

Truck Loading and Unloading Rates at New York Harbor, 13 F.M.C. 51 (1969) 15, 18-19

Statutes:

Carriage of Goods by Sea Act, 49 Stat. 1208, 1212, 46 U.S.C. 1301 (e), 1311 17

Harter Act, 27 Stat. 445, 46 U.S.C. 190, 191 18

Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended 1972, 86 Stat. 1251, 33 U.S.C. 901, et seq.

§ 2(2), 33 U.S.C. 902(2) 9-10
§ 2(3), 33 U.S.C. 902(3) 2, 3, 7, 8, 10, 11, 12, 16
§ 2(4), 33 U.S.C. 902(4) 2, 3, 12
§ 3(a), 33 U.S.C. 903(a) 2, 3, 9, 10, 12
§ 19(d), 33 U.S.C. 919(d) 4-5
§ 21(b), 33 U.S.C. 921(b) 3, 5
§ 21(c), 33 U.S.C. 921(c) 5

PAGE

Regulations:

20 C.F.R. 702.331, et seq. 5

Tariff:

New York Terminal Conference Port of New York Marine Terminal Tariff No. 2, F.M.C.—T No. 16 (filed 9/1/75) 18, 19

Congressional Reports:

House Report No. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. and Adm. News, vol. 3, p. 4698 .....7, 8, 12-13

Senate Report No. 92-1125, 92d Cong., 2d Sess. (1972) 7, 8, 12-13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC.
and STATE INSURANCE FUND,

Petitioners,

—against—

RALPH CAPUTO and Director, Office of Workers' Compensation Programs, United States Department of Labor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The 2-1 opinion of the Court of Appeals, printed in appendix A to the petition for certiorari (Pet. 1a), is reported at 544 F. 2d 35 and is unofficially reported in 1976 A.M.C. 881. The decision of the Benefits Review Board, United States Department of Labor, printed in appendix B to the petition for certiorari (Pet. 47a), is reported in 3 BRBS 13. The decision and order of the Administrative Law Judge, United States Department of Labor, printed in appendix C to the petition for certiorari (Pet. 51a), is unreported but there is a synopsis in 2 BRBS 4.

Jurisdiction

The judgment of the Court of Appeals dated July 1, 1976, printed in appendix D to the petition for certiorari (Pet. 56a)* was entered on July 1, 1976. The petition for certiorari was timely filed on September 27, 1976. The petition was granted on December 6, 1976 and was consolidated for argument with *International Terminal Operating Co., Inc.* v. *Blundo,* (U.S. 76-454), a consolidated supplemental appendix* having been filed in both cases. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statute Involved

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended in 1972, 86 Stat. 1251, 33 U.S.C. 902(3), the pertinent language being: "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations • • • ." Also involved for purposes of construing Section 2(3) are Section 2(4), 33 U.S.C. 902(4), and Section 3(a), 33 U.S.C. 3(a), of the Act. Those three Sections of the Act as they read before and after the 1972 Amendments are printed in the appendix to this brief.

* Pages in the appendices annexed to the petition for certiorari are referred to as Pet. a. Pages in the supplemental appendix are referred to as A.

Question Presented

When compensably injured, was respondent Caputo an "employee" as now defined by Section 2(3) of the Longshoremen's and Harbors Workers' Compensation Act, 33 U.S.C. 902(3)?

Statement

On the record, which consists of stipulations, respondent Caputo's testimony, and a map, (A1-A52), the Administrative Law Judge, whose "findings of fact • • • shall be conclusive if supported by substantial evidence in the record considered as a whole", 33 U.S.C. 921(b)(3), Pet. 26a, found that (Pet. 52a-54a):

On April 16, 1973, Caputo was injured while helping load boxes of cheese inside a consignee's truck which was parked 400 feet from the water but still inside a terminal[1] leased by Caputo's employer Northeast Marine Terminal Company, Inc.[2] The cheese had been discharged from a ship at least 5 days before, and was then stored on the terminal awaiting the truck's arrival. After a forklift vehicle put the cheese onto a rolling dolly inside the truck, Caputo was injured when he tripped over a backstop on the truck floor and caught his foot under the dolly. It was stipulated "that the

[1] The situs of Caputo's accident unquestionably met the requirements of § 3(a) of the Act, 33 U.S.C. 903(a), because the terminal adjoins navigable waters of the United States and parts of the terminal are used in loading and unloading ships.

[2] Petitioner Northeast is unquestionably an "employer" as defined in § 2(4) of the Act, 33 U.S.C. 902(4), because some of its employees "are employed in maritime employment, in whole or in part, upon the navigable waters of the United States", as therein defined.

work claimant was doing when injured was the same work with the same risk factor as would obtain wherever and by whomsoever trucks were loaded or unloaded with a dolly" (Pet. 54a).

There was additional undisputed evidence that Caputo, who said his occupation was "longshoreman" (A 7) and who was a member of the International Longshoremen's Association (A 9), usually worked for another employer in a gang which directly loaded and discharged ships (A 10, 13). Caputo was hired by Northeast on the accident date as a terminal laborer (A 14), a category called "extra labor/ freight handler" (A 5) variously used to load and unload trucks, containers, barges, lighters, and ship's stores and laundry (A 8). Northeast assigned Caputo to help consignees' truckmen load their trucks (A 5, 23, 38), which Caputo did all morning and after lunch until injured (A 29). After the boxes of cheese were discharged from the ship, the boxes were stored in a terminal warehouse on the perimeter of the yard where trucks were customarily loaded and unloaded (A 33, 43-44). A forklift brought the boxes from the warehouse and put them on the ground near the truck's tailgate (A 23, 39) from whence a forklift put the boxes inside the truck onto a dolly, and pushed the dolly toward the back of the truck (A 28). Caputo's job was to help pull the dolly further into the truck and take the boxes off the dolly and stow them in the truck (A 35-36).

On the ground that Caputo's injury was compensable only under New York law, petitioners contested Caputo's Longshoremen's and Harbor Workers' Compensation Act claim, which was referred to an Administrative Law Judge for hearing, pursuant to Section 19(d) of the Act, 33 U.S.C.

919(d), and 20 C.F.R. 702.331, et seq. The Judge sustained Caputo's claim on authority of *Avvento* v. *Hellenic Lines,* 1 BRBS 174 (1974), 1975 A.M.C. 153, which held that a truck loader, such as Caputo, is covered by the Act because:

> "The claimant's function was a step in the loading and unloading process as described in Section 3(a) of the Act. A part of that function was to load trucks for the removal of cargo from the pier. To say that once the goods have come to rest on the pier after being removed from the ship they are completely unloaded and no longer maritime in nature is erroneous in light of the 1972 amendments to the Act. • • • until cargo is delivered to a trucker or other carrier who is to pick it up for further transshipment, such cargo is in maritime commerce and all employees engaged in its movement to that point are engaged in maritime employment." 1975 A.M.C., pp. 154-155.

Petitioners appealed the Judge's decision and order (Pet. 51a) to the Benefits Review Board, pursuant to Section 21(b) of the Act, 33 U.S.C. 921(b). The Board affirmed on authority of its unappealed *Avvento* decision and its decision in *Adkins* v. *I.T.O. Corporation of Baltimore,* 1 BRBS 199 (1974), 1974 A.M.C. 2427, subsequently reversed sub nom. *I.T.O. Corp. of Baltimore* v. *Ben. Rev. Bd.* (1976), 529 F. 2d 1080 (4 Cir. 1975), reh. in banc 542 F. 2d 903, cert. pend. sub nom. *Adkins* v. *I.T.O. Corp. of Baltimore,* (U.S. 76-730), hereinafter cited as *Adkins.*

Petitioners appealed the Board's decision (Pet. 47a) to the United States Court of Appeals for the Second Circuit, pursuant to Section 21(c) of the Act, 33 U.S.C. 921(c).

In an opinion by Judge Friendly (Pet. 3a), Judge Lumbard dissenting (Pet. 45a), the Court of Appeals affirmed the Board on the ground, in Caputo's case[3], that the Act's 1972 "Amendments at least cover all persons meeting the situs requirements • • • [who] are engaged in the handling of cargo up to the point where the consignee has actually begun its movement from the pier (or in the case of loading, from the time when the consignee [sic.] has stopped his vehicle at the pier), provided • • • the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel." (Pet. 42a).

Summary of Argument

To avoid disparate, anomalous, and contentious coverage with consequent intolerable administrative difficulties and litigation which would be contrary to the fundamental purpose of the Act, Caputo's compensable status should be determined solely by the work he was doing when injured, and not by other work he frequently did. When injured, Caputo was not unloading a ship, nor was he engaged in maritime employment since the freight he was helping load in the truck was not in maritime commerce. Thus, a determination that his injury is not covered by the Act will be most consistent with the statutory language, legislative history, established maritime law, and traditional industry practice.

[3] Petitioners' appeal was consolidated for argument before the Court of Appeals with three others, and in a single opinion the Court dismissed one petition as untimely and another as moot and denied the other two on the merits. The other employer whose petition was denied on the merits is the petitioner in *International Terminal Operating Co., Inc.* v. *Blundo,* (U.S. 76-454), which has been consolidated herewith for argument.

ARGUMENT

I

Caputo's compensable status should be determined solely by the work he was doing when injured.

The threshold question is whether Section 2(3), 33 U.S.C. 902(3), "employee" status depends (1) on the work the injured person was doing (or had been assigned to do) at the time he was hurt or (2) on his job at that time and other work he generally or frequently did at other times. If, as suggested but not decided below[4], Caputo's otherwise state compensable injury is federally compensable because he usually worked for another employer in a gang which directly loaded and discharged ships (A 10, 13), then the Court may not need to construe the precise Section 2(3) meanings of "maritime employment", "longshoreman", "or other person engaged in longshoring operations".

There is no explicit answer to this question in either the Act or its legislative history.[5] In context, it appears un-

[4] "• • • whether the proviso [that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel] is essential can be left for another day." (Pet. 42a)

[5] S.Rep. 92-1125, 92d Cong., 2d Sess.; H.R.Rep. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. and Adm. News, vol. 3, p. 4698. The identical portion of the Senate and House Reports entitled "Extension of Coverage to Shoreside Areas" is printed in the appendix to this brief.

Shoreside extension of coverage was scarcely mentioned during the May, June, and July 1972 hearings on H.R. 247, H.R. 3505, H.R. 12006, H.R. 150203, S. 525, S. 1547, and S. 2318. The only allusion in 332 pages of House hearings is on page 297 to the amphibious longshoreman whose coverage depended on which side of the water's edge he was working, and in 843 pages of Senate hearings the subject is touched upon only three times, pp. 38-39, 73-74, 176-177, a union official having stated that there was "very little criticism in terms of the coverage", pp. 73-74.

likely that expressed congressional intent to exclude from federal coverage "employees whose responsibility is only to pick up stored cargo for further trans-shipment", S.Rep., p. 13; H.R.Rep., p. 11, and implicit intent to exclude checkers "who are [not] directly involved in the loading or unloading functions", *ibid.*, was tacitly conditioned on whether those persons frequently loaded and unloaded ships. However, the Committees did somewhat ambiguously state their intent "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity", S.Rep., p. 13; H.R. Rep., pp. 10-11.

To the majority below, "otherwise covered for part of their activity" indicated congressional intent "to cover a person like Caputo who spent a significant part of his time working on vessels" (Pet. 38a). In *Stockman* v. *John T. Clark & Son of Boston,* 539 F. 2d 264 (1 Cir. 1976), cert. pend. sub nom. *John T. Clark & Son of Boston, Inc.* v. *Stockman,* (U.S. 76-571), hereinafter cited as *Stockman,* the Court thought the quoted Committee language meant to include "a steadily employed longshoreman whose duties periodically took him aboard ship", 539 F. 2d, p. 275, and that Section 2(3) "employee" status requires "bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier Act—not necessarily a demonstration by each claimant that he individually would have been covered", 539 F. 2d, p. 277. In *Sea-Land Serv.* v. *Director* [etc.], 540 F. 2d 629 (3 Cir. 1976), hereinafter cited as *Johns,* the Court held that the status test is "functional", 540 F. 2d, p. 636, and observed that "the dominant purpose of the 1972 amendments in extending the Act's coverage to

areas previously left to the states was to make more uniform the death and disability compensation system for maritime employees so that maritime workers would no longer walk into federal coverage, and out of state coverage, and vice versa, *in the course of a day's work.* [italics added] This sentiment is clearly expressed in identical language in both the House and Senate reports accompanying the legislation:" [thereinafter quoted], 540 F. 2d, p. 637. In *Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F. 2d 533 (5 Cir. 1976), cert. pend. sub nom. *P.C. Pfeiffer Co., Inc.* v. *Ford,* (U.S. 76-641), hereinafter cited as *Ford,* the Court (we believe correctly) considered that the quoted Committee language "was speaking of one inequity of the old 'water's edge' approach, under which cargo handlers would walk in and out of coverage as they moved between ship and shore", 539 F. 2d, p. 541, fn. 21, and held, 539 F. 2d, pp. 539, 541, 542, in accord with *Weyerhaeuser Company* v. *Gilmore,* 528 F. 2d 957, 960 (9 Cir. 1975), cert. den. sub nom. *Gilmore* v. *Weyerhaeuser Co.,* —— U.S. —— (U.S. 75-1620, 10/4/76), hereinafter cited as *Gilmore,* and *Adkins,* 529 F. 2d, pp. 1084, 1088, fn. 4, that Section 2(3) "employee" status must be based solely on the work the injured person was doing at the time of his accident, and not on the work he generally or regularly or previously did.

Pennsylvania R. Co. v. *O'Rourke,* 344 U.S. 334, 341-342 (1953), holds that Section 3(a), 33 U.S.C. 903(a), "navigable waters" situs is determinative at the time of injury[8], and reaffirms, 344 U.S., p. 340, that the Section 2(2), 33

[8] In *Ford,* 539 F. 2d, p. 541, the Court held: "As with the 'maritime employment' test, we also interpret the Act as requiring that the situs meet the statutory requirements as of the time of the injury. It will not suffice if the area was so used only in the past, or if such uses are merely contemplated for the future."

U.S.C. 902(2), requirement that the injury arise "in the course of employment" and the Sections 2(3), 3(a)(1), 33 U.S.C. 902(3), 903(a)(1) exclusions of "member of a crew of any vessel" must also be determined at the time of injury, citing, inter alia, *Parker* v. *Motor Boat Sales*, 314 U.S. 244, 247 (1941), which rejected "habitual performance of other and different duties on land" as altering the fact that the employee's accident occurred on navigable waters, and *Long Island R. Co.* v. *Lowe*, 145 F. 2d 516, 518 (2 Cir. 1944), which held that: "The employee's duties on the day of the accident [and not other work he had done during his employment] are the critical facts which should determine his status as a member of the tug's crew."

It would be anomalous if Section 2(3) "employee" status were affirmatively established by what the worker generally did at other times, but he was excluded under Sections 2(3), 3(a)(1) because of the work he was doing when injured. The "significant part of his time in typical longshoring activity" and "bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier Act" criteria engrafted by the majority below and *Stockman* are practically indefinable and would generate more litigation and disparate, inequitable coverage than could be tolerated. How much time is "significant"? Is it time before or after the accident, or both? What about a new employee who has no "significant" prior work time and is too disabled to continue working?[7] What is "bona fide membership"? Is "for the most part have been covered some of the time" susceptible to any uniform meaning? And why should compensable

[7] *Stockman* seemingly attempts to hedge against this difficulty by limiting its decision to "a steadily employed longshoreman", 539 F. 2d, p. 275, whatever that may mean.

status depend on coverage under "the earlier Act" when the 1972 Amendments were indisputably intended to expand the former coverage?

Language, logic, case law, and common sense combine to dictate that compensable status of all employees—new and old, typical and atypical, steady and casual, bona fide members and non-members—can best and should be determined by the work the injured employee was doing (or had been assigned to do) when he was hurt.

II

Caputo's status is not compensable because he was not unloading a ship.

The next question is whether Section 2(3), 33 U.S.C. 902(3), "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations" necessitates that the employee be unloading (or loading) a ship when injured. Again, there is no explicit answer in the Act or legislative history. As stated by the majority below (Pet. 9a): "The problem with which we are here concerned arises from Congress' failure to supply any definition of two terms in § 902(3)—'engaged in maritime employment' and 'any longshoreman or other person engaged in longshoring operations'."[8]

[8] Although the majority below held that Congress intended to cover "workers injured while engaged in the process of loading or unloading ships" (Pet. 41a) and noted that Caputo "was injured while helping a cargo consignee's truckdriver load boxes of cheese * * * inside the consignee's truck" (Pet. 11a), the majority did not decide whether "the process of unloading a vessel continues until the cargo is deposited on the consignee's truck" (Pet. 22a) and refused to make a "wholly artificial" distinction between the job of the forklift operator who moved the cheese from the terminal warehouse to the truck who, the majority conceived,

[con't p. 12]

Despite professed inability "to construct a 'hazard' test" (Pet. 41a), the majority below acknowledged the significance of Congress' concern for the "extraordinary hazards" of longshoring (Pet. 40a), in contradistinction to "the work [Caputo] was doing when injured [which] was the same work with the same risk factor as would obtain wherever and by whomsoever trucks were loaded or unloaded with a dolly" (Pet. 54a). That congressional concern is evinced by "load or unload" and "loading, unloading" in the Sections 2(3), 2(4) definitions and Section 3(a) coverage and, more significantly, in the Committee Reports, S.Rep. 92-1125, p. 13; H.R.Rep. 92-1441, p. 11:

> "The Committee does not intend to cover employees who are not engaged in loading, unloading • • • a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment."

As a "typical example" of the kind of function which Congress intended to cover by the expansive Amendments, the Reports state, *ibid.*, that:

> " • • • cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area."

"clearly would have been engaged in 'unloading' in the way that term is used in ordinary speech" and Caputo's job inside the truck (Pet. 39a).

Applied to the facts of this case, the Reports make it at least reasonably evident, if not indisputably clear that the longshoremen on the ship who discharged the cheese, and the longshoremen on the pier adjoining the ship who landed the cheese, and the forklift operators who "immediately transported" the cheese to the terminal warehouse, "a storage or holding area on the pier"[9], were all covered by the amended Act, and that the forklift operators who "pick[ed] up" the "stored cargo" of cheese from the terminal warehouse and brought it alongside the truck and lifted it into the truck "for further trans-shipment would not be covered"[10] nor, *ipso facto*, would truck loader Caputo.

In *Adkins*, a majority of the Court determined that injury to a forklift operator while he was moving cargo from a terminal warehouse 685 feet from the water, where the cargo had been stored 4 days awaiting pick up by the consignee, to the consignee's truck, was not covered by the

[9] The majority below, contrary to the Administrative Law Judge's finding that the cheese "had been stored on the terminal's premises awaiting the arrival of the consignee" (Pet. 52a), did not regard the cheese "as 'stored' within the committees' meaning simply because the consignee had delayed five days in picking it up" (Pet. 39a) and suggested, contrary to the Committees' broader designation of *"storage or holding* area on the pier, wharf, or terminal", that cargo was not "stored" unless "placed in a public warehouse" (Pet. 39a, fn. 24).

[10] "Transshipment contemplates a significant, identifiable change in the nature, the mode and the conveyance used in the carriage of cargo." *Port Royal Marine Corporation* v. *United States*, 378 F. Supp. 345, 352 (S.D.Ga. 1974), aff'd 420 U.S. 901 (1975).

Act, 529 F. 2d, pp. 1082, 1088. The majority held that although Adkins "performed a function in the overall unloading of the ship", 529 F. 2d, p. 1082, because "maritime employment" "embodies the concept of a direct relation to a vessel's navigation and commerce", 529 F. 2d, p. 1084; cf., *Gilmore,* 528 F. 2d, p. 961, and because "To the extent pertinent here, the 1972 Amendments were a direct response to the invitation in *Nacirema*" [11], 529 F. 2d, p. 1086, and because the legislative history further confirmed that "employees not engaged in loading or unloading a vessel were *not* to be covered even if they were injured on land in an area used for such activity", 529 F. 2d, p. 1087, "the Act applies between the ship and, in the case of unloading, the *first* storage or holding area on the pier, wharf, or terminal adjoining navigable waters", 529 F. 2d, p. 1087, known to the industry as the "point of rest", 529 F. 2d, pp. 1087, 1088. "Since Adkins was injured landward of the first point of rest • • • we think it follows that [he was not] afforded coverage under the Act, as amended. • • • with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers 'directly involved in [such] loading or unloading functions.' ", 529 F. 2d, p. 1088. Judge Craven dissented, *inter alia,* on the ground that since Adkins was engaged in the overall process of unloading, he was subjected to the covered risks inherent in moving cargo, 529 F. 2d, pp. 1100-1101. On rehearing in banc, Judge Widener joined the

[11] "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. • • • The invitation to move that [coverage] line landward must be addressed to Congress, not to this Court." *Nacirema Operating Co.* v. *Johnson,* 396 U.S. 212, 223-224 (1969).

majority in affirming that Adkins' injury was not covered by the Act because: "The cargo was no longer being unloaded from the ship but was in the process of being loaded into a delivery truck. Adkins • • • was thus not covered because he was not participating in the unloading process; he was handling the goods for transshipment.", 542 F. 2d, p. 905.

Judge Widener's common sense analysis of Adkins' function commends itself to Caputo's. It distorts everyday language beyond meaningful usage to say that a person loading a truck is unloading a ship several days after the ship has sailed or, as in the *Ford* case, that a person stacking bales in a storage warehouse, 539 F. 2d, p. 544, is "directly involved", 539 F. 2d, pp. 539-540, 541, fn. 21, in loading a ship several days before the ship arrives.[12]

[12] "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew." *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 96 (1946). Ancient mariners did not leave some of the crew behind to load drays, or send some of them ahead to stack freight. Borrowing from a Judge Lumbard dissent approvingly quoted in *United Pilots Ass'n* v. *Halecki,* 358 U.S. 613, 618 (1959), Caputo "was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed." By I.C.C. definition, he was a truck loader. *Levinson* v. *Spector Motor Co.,* 330 U.S. 649, 652 (1947). In the Port of New York, until World War I consignees' truckmen loaded their own trucks, and thereafter until 1954 the trucks were loaded by public loaders. *Truck Loading and Unloading Rates at New York Harbor,* 13 F.M.C. 51, 53-54 (1969).

III

Caputo was not "engaged in maritime employment" because the freight he was truck-loading was not in maritime commerce.

Even if in his *Adkins* dissent, 529 F. 2d, p. 1090, Judge Craven correctly analyzed that Section 2(3), 33 U.S.C. 902(3) "engaged in maritime employment" generically makes it unnecessary that the injured employee be loading or unloading a ship, it boggles the mind to conceive that a workman handling freight which is not in maritime commerce is nevertheless engaged in maritime employment."[18] In *Johns,* where the issue was the compensability of an injury to a shuttle driver who moved freight from one marine terminal to another, 540 F. 2d, p. 632, the Court discerned that the Act's jurisdictional limits "depend on the presence of a nexus between the employer-employee relationship and maritime commerce", 540 F. 2d, p. 636, and that:

"• • • the overall intention [of the 1972 Amendments] appears to be to afford federal coverage to all those employees engaged in handling cargo after it has been delivered from another mode of transportation for the

[18] It is perhaps no less disturbing to envision a workman injured while engaged in maritime employment who, unless traumatized by a ship's appurtenance, did not suffer a maritime tort. *Industrial Comm.* v. *Nordenholt Co.*, 259 U.S. 263, 272-273 (1922); *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 210 (1971), reh. den. 404 U.S. 1064 (1972); *Vizciano* v. *Industrial Export Lines*, 1974 A.M.C. 1196, 1197 (S.D.N.Y. 1974). "The 1972 amended prerequisite of 'maritime employment' is a clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employee. In other words, the fixed federal compensation is provided in lieu of the uncertainty of a recovery by an injured ship worker for a maritime tort." *Gilmore*, 528 F. 2d, p. 961; cf., Pet. 31a-32a, fn. 18.

purpose of loading it aboard a vessel, and to all those employees engaged in discharging cargo from a vessel up to the time it has been delivered to a place where the next mode of transportation will pick it up. A stevedore may receive cargo • • • for delivery to a truck or rail carrier. The limits of federal coverage is defined • • • by the location of the interface between the air land and the water modes of transportation. • • • The key is the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing. • • • The line which Congress intended to draw was between maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes to or from an employer engaged in the former to an employer engaged in the latter. • • • The line should be drawn where cargo is delivered to a segregated place for delivery to the next mode of transportation.

We note that defining the scope of federal workmen's compensation coverage in this manner is consistent with the provisions of the Harter Act, 46 U.S.C. § 193, and the Carriage of Goods by Sea Act, 46 U.S.C. § 1303 (3), defining the point at which the responsibility of the maritime carrier begins. While these statutes do not tell us what the Ninety-Second Congress had in mind when it passed the [Longshoremen's and Harbor Workers' Compensation Act] amendments, there is some virtue in a construction of the latter statute that produces consistency with other enactments relating to maritime commerce.", 540 F. 2d, pp. 638, 639.

The Carriage of Goods by Sea Act, 49 Stat. 1208, 1212, 46 U.S.C. 1301(e), 1311, is applicable "from the time when

the goods are loaded on to the time when they are discharged from the ship", and, with respect to discharged cargo, the Harter Act, 27 Stat. 445, 46 U.S.C. 190, 191, applies until "delivery" of the cargo. To make "delivery" and thereby terminate the maritime contract of carriage, the carrier is not required to place the cargo "into the possession of the consignee", *Richardson* v. *Goddard,* 64 U.S. (23 How.) 28, 39 (1859). Delivery is accomplished after discharge by giving "due and reasonable notice to the consignee" [14], *ibid.*, and making the cargo "conveniently accessible" for pick up by the consignee, *The Eddy,* 72 U.S. (5 Wall.) 481, 495 (1866), during a reasonable period, called "free time".[15]

In the Port of New York, for discharged break bulk cargo such as the boxes of cheese in this case, the "free time" is generally five business days, New York Terminal Conference Port of New York Marine Terminal Tariff No. 2, F.M.C.—TNo. 16 (filed 9/1/75) p. 16, and "conveniently accessible" means putting the cargo on the ground alongside the tailgate of the consignee's truck, *Truck Loading and Unloading Rates at New York Harbor,* 13 F.M.C. 51, 62 (1969). The carrier is not required or expected to load or

[14] Notice of cargo availability is unnecessary in the Port of New York. "Consignees are universally apprised of the arrival of vessels and routinely inform themselves by telephone, messenger, or reference to shipping publications, as to the availability of their cargoes • • •." *Free Time and Demurrage Charges at New York,* 3 U.S.M.C. 89, 106 (1948).

[15] Free time "is a period which is covered by the rates for the ocean transportation and which is allowed for the removal of the property from pier after its discharge from vessel." *Free Time and Demurrage Charges at New York,* 3 U.S.M.C., p. 91, fn. 5; *California* v. *United States,* 46 F. Supp. 474, 476 (N.D. Cal. 1942), aff'd 320 U.S. 577 (1944), reh. den. 321 U.S. 802 (1944).

help load the consignee's truck.[16] "We agree that this would be a new concept in the industry. • • • we are not suggesting such a requirement. • • • We are not requiring the carrier to load or to provide labor for loading [a consignee's truck]", *ibid.,* 13 F.M.C., pp. 63-64.

If the consignee does not take "delivery" (i.e., pick up accessible cargo before expiration of the free time) the maritime contract ends and the goods thereby cease to be in maritime commerce, *Richardson* v. *Goddard, supra,* 64 U.S., p. 39; *The Eddy, supra,* 72 U.S., p. 495; *Calcot, Ltd.* v. *Isbrandtsen Co.,* 318 F. 2d 669, 673 (1 Cir. 1963); *Leather's Best, Inc.* v. *S.S. Mormaclynx,* 451 F. 2d 800, 807, fn. 5 (2 Cir. 1971). The terminal operator is then deemed to have accepted delivery on behalf of the consignee and may charge the consignee demurrage[17] and/or put the goods in public storage at the sole risk and expense of the consignee and, if the goods remain on the terminal more than 30 days, sell them for collection of demurrage charges. New York Terminal Conference (etc.) Tariff No. 2, *supra,* pp. 16, 18.

Thus, as explicated by Judge Prettyman in *American President Lines, Ltd.* v. *Federal Maritime Board,* 317 F. 2d 887 (D.C. Cir. 1962):

> "Ships bringing transoceanic freight into port are required by their transportation obligation, absent a

[16] In the Port of New York, truck loading is usually done by employees of terminal operators, such as petitioner Northeast, who are members of the New York Terminal Conference, "with the assistance, and under the supervision, of the driver of the truck" and at the expense of the consignee or its trucker. New York Terminal Conference (etc.) Tariff No. 2, *supra,* pp. 21-23.

[17] Demurrage is a "charge assessed against cargo remaining in or on the terminal facilities after the expiration of free time.", New York Terminal Conference (etc.) Tariff No. 2, *supra,* p. 16.

special contract, to unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee, and afford the consignee a reasonable opportunity to come and get it. This was settled by the courts many years ago. [footnote citations omitted.] Circuit Judge Goodrich stated, in North American Smelting Co. v. Moller S. S. Co., [204 F.2d 384, 386 (3 Cir. 1953), that 'There is no doubt that in discharging the cargo onto the pier and notifying the consignee the carrier was no longer in possession of the goods so as to suffer the risk of loss not due to any negligence on its part.' The work of unloading and putting the cargo on the dock is done on behalf of the carrier by longshoremen, who are laborers skilled in this sort of thing, or by stevedoring companies under contract with the carriers, these stevedores employing longshoremen. There is not now, and does not appear ever to have been, absent a special contract, any obligation on the part of the carriers to put such cargo actually into the hands of consignees, as by putting it into trucks and hauling it to the consignees' places of business. Consignees are obligated, after notice and reasonable opportunity, to come and pick up their goods at the pier. 317 F.2d, p. 888.

• • • •

In the industry concerned in this case there seems to us to be no room for dispute over the nature of the obligation of the carrier. It tenders for delivery; it does not deliver. It makes a valid and complete tender when it puts the cargo on the dock, reasonably accessible, properly segregated and marked, and leaves

it there for five days; with notice, of course. 317 F.2d, p. 889.

• • • •

The Board's position, as made clear by its brief and argument here, is that the legal duty of the carrier to deliver continues until the consignee calls for the cargo; that even after free time has expired the carrier has the duty of making the cargo physically available to the consignee's trucks; and that the carrier must provide the labor to load the consignee's trucks. A longshore strike, the Board says, prevents the carrier from fulfilling this obligation. This is a violent shift from the provisions of General Order 69 and introduces a new concept into the industry. A carrier does not, as we have pointed out, under long-established customs and official rules, deliver goods to consignees; it tenders them for delivery, makes them available for delivery. 317 F.2d, pp. 890-891.

• • • •

For the foregoing reasons the order entered by the Board on December 15, 1960, in Docket No. 859, Free Time and Demurrage Charges—New York, is set aside as invalid and the matter is remanded to the Board for further proceedings in accordance with this opinion." 317 F.2d, p. 891.

Caputo was not a "longshoreman injured while doing the ship's work", *Seas Shipping Co.* v. *Sieracki, supra,* 328 U.S., p. 89. He was a truck loader of freight which was no longer in maritime commerce and he therefore was not "engaged in maritime employment".

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the court below in this case should be reversed.

Respectfully submitted,

PETER M. PRYOR
WILLIAM M. KIMBALL
Counsel for Petitioners

New York, N.Y.
January 21, 1977

APPENDIX

APPENDIX

Following are Sections 2(3), 2(4), and 3(a) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 1426, as amended in 1972, 86 Stat. 1251, 33 U.S.C. 902(3), 902(4), 903(a). The pre-1972 language which the Amendments eliminated is enclosed in black brackets; the new language which the Amendments added is printed in italics; and the pre-1972 language which the Amendments left unchanged is printed in roman.

DEFINITIONS

SEC. 2. When used in this Act—

(3) The term "employee" *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such term* does not include a master or member of a crew of any vessel, [nor] *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States [(including any dry dock)] (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*).

COVERAGE

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States [(including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law] (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*). No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, [nor] *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

Following is the identical portion of the Senate and House Reports, S.Rep. No. 92-1125, 92d Cong., 2d Sess., pp. 12-13; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., pp. 10-11, 1972 U.S. Code Cong. and Adm. News, vol. 3, pp. 4707-4708, entitled "Extension of Coverage to Shoreside Areas":

The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge;

injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. The following are the maximum limits on the compensation payable for permanent total disability in some maritime States:

California	$70.00
Florida	56.00
Hawaii	112.50
Louisiana	49.00
Maryland	85.68
Massachusetts	[1] 77.00
New Jersey	101.00
New York	80.00
Oregon	62.50
Pennsylvania	60.00
Texas	49.00

Also, under the laws of some states due to exemptions based upon the number of employees hired some workers might be uncovered in the event they are unfortunate victim of an injury.

---

[1] Plus $6 for each dependent.

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable

waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.